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A Thirty-Year Retrospective of Legal Developments Impacting College Athletics

Timothy Davis

ESSAYS

A THIRTY-YEAR RETROSPECTIVE OF LEGAL DEVELOPMENTS IMPACTING COLLEGE ATHLETICS

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I am delighted and honored to participate in this conference recognizing the thirtieth anniversary of the National Sports Law Institute. When tasked with identifying important legal developments impacting college athletics over the past thirty years; however, I quickly realized that the evolving college athletics' legal landscape generated a plethora of possibilities. In attempting to narrow my long initial list, I decided to focus on developments that transcended the narrow legal issue that a court decided or the specific issue addressed by a legislative enactment. With this imperfect guiding principle, what follows is my humble attempt to identify key legal developments. I apologize in advance if your favorite case or other legal development fails to appear below. If it provides any solace, it more than likely appeared on my initial list.

I. THE STUDENT-ATHLETE/UNIVERSITY RELATIONSHIP

A. Contractual Relationship and Academic Opportunity

Ross v. Creighton University[1]

Kevin Ross, who was recruited to play basketball at Creighton University, entered the university with substantially lower academic predictors than most

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1. Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992).

Creighton students.[2] During his time at Creighton, Ross obtained 96 of the 128 credits he needed to graduate.[3] Several of these credit hours were earned in classes that did not count toward his degree.[4] Ross left Creighton without a degree and with the language skills of a fourth grader and the reading skills of a seventh grader.[5]

Ross asserted several theories in a lawsuit against Creighton. Among them, Ross asserted an educational malpractice claim arising from Creighton's alleged failure to provide him with a meaningful education and prepare him for post-college employment.[6] The Seventh Circuit affirmed the district court's rejection of Ross's claim.[7] Both courts adhered to judicial precedent refusing to recognize educational malpractice claims against educational institutions and adopted commonly articulated policy reasons including: (1) the difficulties inherent in establishing a uniform standard of care given the difference in approaches to education and the often subjective nature of the educational process;[8] (2) the uncertainties inherent in educational malpractice claims relating to causation and measuring damages for breach;[9] (3) the potential flood of litigation and liability exposure of schools that would likely ensue if such a claim were recognized;[10] and (4) academic abstention—judicial reticence to interfere in educational matters given educators' presumptive greater expertise regarding educational matters than courts.[11]

The Seventh Circuit, like the district court, also rejected Ross's negligent admission claim, which would have allowed tort relief if an institution admits academically under-prepared student-athletes but fails to adequately assist them in taking advantage of the institution's educational opportunities.[12] The court rejected this claim based on policies, including: (1) the difficulty of developing a definable standard of care;[13] (2) the risk of unduly interfering with colleges' admissions decisions and the potential harm to prospective students and society

2. *Id.* at 411.
3. *Id.* at 412.
4. *Id.*
5. *See id.*
6. *Id.*
7. *Id.* at 415.
8. *See id.* at 414.
9. *Id.*
10. *Id.*
11. *See id.* at 414–15.
12. *Id.* at 415.
13. *Id.*

at large;[14] and (3) the possibility that institutions would be reluctant to admit marginal students if doing so exposes institutions to tort liability.[15]

Ross also asserted a breach of the contract claim based on Creighton's alleged failure to provide him with a meaningful opportunity to participate in and benefit from Creighton's educational program.[16] Finding that the student-athlete/university relationship is contractually based, the court rejected Ross's breach of contract claim to the extent that it was merely restating an educational malpractice claim based on the deficient quality of the education Ross allegedly received at Creighton.[17] In reaching this conclusion, the court relied on the same policy reasons on which it rejected Ross's educational malpractice claim.[18] The court carved out a specific promise exception, under which a cognizable contract cause of action arises if a student-athlete can establish that the university made a specific promise that it failed to fulfill (*e.g.*, promising to provide specific services and failing to do so).[19]

Ross has merited a place on the most significant legal developments for the following reasons:

- *Ross* reaffirmed the contractual nature of the student-athlete/university relationship.
- *Ross* also, however, rejected the student-athlete's attempt to have the court imply terms and thereby impose obligations on institutions beyond those expressly stated in the parties' contract document. Courts in subsequent cases have been reluctant to imply terms into the student-athlete/university express contract.[20]
- Although Ross was unsuccessful in his lawsuit, the notoriety surrounding his and similar instances of recruited student-athletes not developing educationally during their time in college influenced NCAA academic-related legislation which is discussed below.

14. *Id.*

15. *Id.*

16. *Id.* at 415–16.

17. *Id.* at 416.

18. *Id*. For a thorough discussion of the issues and the court's reasoning in *Ross*, *see generally* Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743 (1991).

19. *See Ross*, 957 F.2d at 417.

20. *E.g.*, McCants v. Nat'l Collegiate Athletic Ass'n, 201 F. Supp. 3d 732 (M.D.N.C. 2016); Jackson v. Drake Univ. 778 F. Supp. 1490 (S.D. Iowa 1991).

B. NCAA Academic Reform Legislation

Beginning in the early 2000s, the NCAA has promulgated academic reform legislation that reduces the likelihood of another Kevin Ross-type scenario occurring. Some of the more important of these reform measures are discussed below.

1. Satisfactory Progress Rules

In 2002, the NCAA enacted "satisfactory progress rules" which require student-athletes to enroll in a curriculum that enhances their ability to make progress toward obtaining a degree.[21] The legislation provides:

> 14.4.1 Academic Status. To be eligible to represent an institution in intercollegiate athletics competition, a student-athlete shall maintain progress toward a baccalaureate or equivalent degree at that institution as determined by the regulations of that institution subject to controlling legislation of a conference or similar association of which the institution is a member and applicable NCAA legislation. (*Revised: 5/29/08, 4/15/09).*[22]

Measures in place to facilitate this progress include certain benchmarks that must be obtained by student-athletes as they progress through college. One such benchmarks pertains to an athlete's program toward obtaining a degree.

> 14.4.3.2 Fulfillment of Percentage of Degree Requirements. A student-athlete who is entering his or her third year of collegiate enrollment shall have completed successfully at least 40 percent of the course requirements in the student's specific degree program. A student-athlete who is entering his or her fourth year of collegiate enrollment shall have completed successfully at least 60 percent of the course requirements in the student's specific degree program. A student-athlete who is entering his or her fifth year of collegiate enrollment shall have completed successfully at least 80 percent of the course requirements in the student's specific degree program. The course requirements must be in the student's specific degree

21. *See Academic Progress Rate Timeline,* NCAA, http://www.ncaa.org/about/resources/research/academic-progress-rate-timeline (last visited Apr. 24, 2020).

22. NCAA, 2019–20 NCAA DIVISION I MANUAL art. 14, 14.4.1, at 174 (Aug. 1, 2019) [hereinafter NCAA DIVISION I MANUAL].

> program (as opposed to the student's major). *(Adopted: 1/10/92 effective 8/1/92, Revised: 1/9/96, 10/31/02, effective 8/1/03*).[23]

2. Enhanced Initial Eligibility Rules

In November 2002, the NCAA also passed legislation that drastically changed its initial eligibility rules.[24] The revised rules "deemphasize[d] standardized test scores (*i.e.*, the SAT and ACT) [and] place[d] greater emphasis on high school grades . . ."[25] The legislation also increased, however, the number of high school core course requirements that athletes must take in order to be eligible to obtain an athletic scholarship and participate in intercollegiate athletics.[26] In support of revised approach, the late NCAA president Myles Brand stated the following rationale:

> The goal in developing the most recent eligibility models was to maximize graduation rates while minimizing disparate impact . . . We believe that eliminating the test-score cut will increase access and that the new progress-toward-degree benchmarks—particularly in the student-athlete's first two years—will put athletes on track to graduate at even higher rates than they already do.[27]

In 2012, the NCAA again heightened its Division I initial eligibility standards.[28] These standards, which became effective August 1, 2016, introduced substantial changes to high school core course requirements such as when athletes must complete core courses during high school and the GPAs that must be attained in such courses.[29]

3. Academic Progress Rate

In May 2004, the NCAA developed a metric known as the Academic Progress Rate (APR), which is calculated by examining each intercollegiate

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23. *Id.* at art. 14.4.3.2.

24. MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 130 (5th ed. 2019).

25. *Id.*

26. *Id.*

27. NCAA News, *NCAA News Archive - 2003*, NCAA NEWS, Sept. 1, 2003, https://ncaanewsarchive.s3.amazonaws.com/2003/Division-I/athlete-graduation-rates-continue-climb---9-1-03.html.

28. *See* MITTEN ET AL., *supra* note 24, at 130.

29. NCAA DIVISION I MANUAL, *supra* note 22, art. 14.3.

athletic team of member institutions.[30] The measure focuses on whether scholarship players on each team have remained academically eligible to participate in intercollegiate athletics and whether the players have chosen to remain enrolled at the school.[31] Teams are awarded one point for meeting each of these standards during a given semester, resulting in each athlete potentially earning the school a maximum of two points per semester and four points per year.[32] Each team gets a final APR score which can be as high as 1,000.[33]

The NCAA initially established a benchmark of 925.[34] A failure of a team to reach a 925 benchmark exposed a college to penalties including scholarship and recruiting restrictions and a team's loss of postseason competition eligibility.[35] Effective 2012–13, the NCAA increased the APR benchmark to 930 (corresponding to a fifty percent graduation rate).[36] "Overall APR numbers released over the past several years indicate positive trends."[37] The overall four-year APR was 983 for the 2017–18 academic year.[38] The 983 APR compares to a 979 APR reported for the 2014–15 academic year.[39]

Heightened NCAA academic requirements increase that likelihood that student-athletes will benefit educationally during their time in college.[40] Some evidence of this is reflected in increased student-athlete graduation rates over the past twenty to thirty years. [41]

30. *See id.* at art. 3.2.4.5, art. 14.02.2.

31. *Academic Progress Rate Explained,* NCAA RESEARCH, http://www.ncaa.org/about/resources/research/academic-progress-rate-explained (last visited Apr. 24, 2020).

32. *Id.*

33. *See id.*

34. MITTEN ET AL., *supra* note 24, at 131.

35. *Id.*

36. *See id.* at 131.

37. *Id.*

38. Michelle Brutlag Hosick, *Division I College Athletes Match Record-High Academic Performance,* NCAA NEWS (May 8, 2019, 1:00 PM), https://www.ncaa.org/about/resources/media-center/news/division-i-college-athletes-match-record-high-academic-performance.

39.

40. *See* Michelle Brutlag Hosick, *College Athletes Graduate at Record High Rates,* NCAA NEWS (Nov. 14. 2018, 1:00 PM), http://www.ncaa.org/about/resources/media-center/news/college-athletes-graduate-record-high-rates.

41. *See id.*

C. Student-Athletes: Employees?

1. Workers' Compensation

Waldrep v. Texas Employers Insurance Association.[42]

In 1972, Kent Waldrep signed a letter of intent and statement of financial aid committing him to play football for Texas Christian University ("TCU").[43] During an intercollegiate football game, Waldrep suffered a career ending spinal cord injury that left him paralyzed from the neck down.[44] Alleging he was an employee of TCU, Waldrep filed a worker's compensation claim against TCU for his injury.[45] The jury instruction defined an "'employee' as 'a person in the service of another under a contract of hire, express or implied, oral or written, whereby the employer has the right to direct the means or details of the work and not merely the result to be accomplished.'"[46] In finding in favor of TCU, the jury failed to specify whether its decision was based on it having found that no contract of hire existed between Waldrep and TCU or that TCU had no right to direct the means of Waldrep's work.[47] The issue before the court was whether there was a scintilla of evidence to support the jury's finding based on either ground.[48]

The court first addressed whether Waldrep and TCU had entered into a contract to hire.[49] The court found that notwithstanding Waldrep's receipt of an athletic scholarship for participating in university-sponsored athletics, the parties had no expectation that Waldrep thereby became a paid university employee.[50] In support of its conclusion, the court cited to a fundamental NCAA policy "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and, by so doing, retain a clear line of demarcation between college athletics and professional sports."[51] The court stated that NCAA policies and rules in effect "exhibited a concerted effort to ensure that each school governed by these rules made certain

42. Waldrep v. Tex. Emp'rs Ins. Ass'n., 21 S.W.3d 692 (Tex. App. 2000).

43. *Id.* at 696.

44. *Id.*

45. *Id.*

46. *Id*. at 698.

47. *Id.*

48. *Id.* at 697 ("We will uphold the jury's findings if more than a mere scintilla of evidence supports it.").

49. *See id.* at 698

50. *See id.* at 698–701.

51. *Id.* at 700.

that student-athletes were not employees."[52] The court added that the surrounding circumstances—including the inability of TCU to fire Waldrep and the fact that neither TCU nor Waldrep treated the athletic scholarship as income—further supported its and the jury's finding.[53]

Turning to the right of control, the court concluded that even though the TCU "*exercised* direction and control over all of the athletes in its football program"[54] TCU did not have the "right to direct or control all of Waldrep's activities during his tenure at the school."[55] The court added that "Waldrep's acceptance of financial aid from TCU did not subject him to any extraordinary degree of control over his academic activities."[56]

Waldrep's significance lies, in part, in the court's unwillingness to recognize student-athletes for workers' compensation as employees of their colleges and universities.[57] In so ruling, the court established precedence on which subsequent courts would rely.[58]

2. Fair Labor Standards Act ("FLSA")

Dawson v. NCAA[59]

A dismissed University of Southern California ("USC") linebacker, Lamar Dawson, alleged that the NCAA and Pac-12 violated the FLSA and the California Labor Code by not paying college football players a minimum wage or overtime pay.[60] In considering three factors critical to employee status under an economic reality test, the court concluded: (1) Dawson's scholarship from USC engendered no expectation of compensation from the NCAA or the PAC-12 because neither defendant provided him with a scholarship;[61] (2) the NCAA's and PAC-12's regulatory roles did not convey upon either entity the power to fire or hire Dawson—neither entity selected who would play on the football team nor had any actual supervisory power over players;[62] and (3)

52. *Id.*

53. *See id.* at 700–01.

54. *Id.* at 702 (emphasis in original).

55. *Id.*

56. *Id.*

57. *Id.* at 697–702

58. *E.g.*, Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 292 (7th Cir. 2016) (citing to *Waldrep* as supporting the proposition that student-athletes generally are not employees of their colleges and universities).

59. Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905 (9th Cir. 2019).

60. *See id.* at 908.

61. *Id.* at 909.

62. *Id.* at 909–10.

NCAA rules were not promulgated or implemented in an effort to evade the law.[63] The court also held that "under California law, student-athletes are generally deemed not to be employees of their schools."[64]

3. Unionization

Northwestern University & College Athletes Players Association (CAPA), Petitioner[65]

During the 2013–2014 academic year, a total of 112 members (including eighty-five scholarship athletes) of the Northwestern University football team petitioned the National Labor Relations Board ("NLRB") about acquiring the necessary status to collectively bargain.[66] An NLRB regional director ruled that the athletes were employees for purposes of establishing their right to form a union within the meaning of Section 2(3) of the National Labor Relations Act and thereby were entitled to choose whether to be represented for collective-bargaining purposes.[67] In reaching this conclusion, the regional director focused on the degree of control that Northwestern possesses over its football players.[68] Northwestern appealed his decision.[69]

In 2015, the NLRB for Region 13, declined to exercise jurisdiction.[70] Electing not to determine whether student-athletes are employees, the Board concluded that even if Northwestern scholarship football players constitute statutory employees:

> Our decision is primarily premised on a finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.[71]

63. *Id.* at 910.

64. *Id*. at 913. *Accord*, Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016); Shephard v. Loyola Marymount Univ., 102 Cal. App. 4th 837, 846 (Cal. Ct. App. 2002).

65. 362 N.L.R.B. 1350 (2015).

66. *Id.* at 1351.

67. *Id*. at 1356.

68. *Id.* at 1352.

69. *Id.* at 1350.

70. *Id.* at 1355.

71. *Id.* at 1352.

The Board expressed concern that the nature of FBS football consisting of 125 colleges of which all but seventeen are public universities would be disrupted given that it would be unlikely that the Board could assert jurisdiction over the public institutions.[72]

> [A]sserting jurisdiction in this case would not promote stability in labor relations. Because most FBS teams are created by state institutions, they may be subject to state labor laws governing public employees. Some states, of course, permit collective bargaining by public employees, but others limit or prohibit such bargaining. At least two states—which, between them, operate three universities that are members of the Big Ten—specify by statute that scholarship athletes at state schools are not employees. . . .asserting jurisdiction would not [promote stability] because the Board cannot regulate most FBS teams.[73]

The Board also declined to exercise jurisdiction because of the recent evolution in the way institutions treat student-athletes in regards to the duration of scholarships and definition of what constitutes a scholarship.[74] The Board stated: "For example, the NCAA's decision to allow FBS teams to award guaranteed 4-year scholarships, as opposed to 1-year renewable scholarships, has reduced the likelihood that scholarship players who become unable to play will lose their educational funding, and possibly their educational opportunity."[75]

The forgoing decisions demonstrate:

- The difficulty that student-athletes have encountered in persuading courts to recognize them as employees of their colleges, their conferences, and/or the NCAA.
- The tendency of courts to accept the NCAA's characterization of the nature of student-athletes' relationships with their institutions and to adopt the NCAA's amateurism model.

72. *Id.* at 1354.

73. *Id.* at 1354.

74. *Id.* at 1355.

75. *Id.*

D. Antitrust Law and Student-Athlete Compensation

1. Antitrust

O'Bannon v. NCAA[76]

In a class action lawsuit, then current and former Division I basketball players asserted that they were entitled to receive a share of the compensation that their institutions had earned from using the athletes' names, images and likenesses ("NILs") in videos, broadcasts and other footage.[77] The district court ruled that NCAA rules prohibiting athletes from receiving compensation for their NILs constituted an unlawful restraint of trade in violation of the Sherman Act in that the rules were more restrictive than required to maintain the NCAA's legitimate goal of maintaining amateurism.[78] The district court issued an injunction enjoining the NCAA from "prohibiting its member schools from giving student-athletes scholarships up to the full cost of attendance at their respective schools and [requiring Division I institutions to give] up to $5,000 per year in deferred compensation, to be held in trust for student-athletes until after they leave college."[79]

On appeal, the Ninth Circuit held that NCAA amateurism rules are not exempt from antitrust scrutiny and must be analyzed under the Rule of Reason.[80] It agreed with the district court that a proper alternative to the NCAA's compensation rule was to permit student-athletes to receive up to the full cost of attendance.[81] It disagreed, however, with the district court's deferred compensation award.[82]

> [T]he district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their education expenses. . . . We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both equally effective in promoting amateurism and preserving consumer demand. Both we and the district court agree that the NCAA's amateurism rule has procompetitive benefits. But in

76. 802 F.3d 1049 (9th Cir. 2015).

77. *Id.* at 1055–56.

78. *Id.* at 1052–53.

79. *Id.* at 1053.

80. *Id.* at 1057.

81. *Id.* at 1075–76.

82. *Id.* at 1079.

> finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*.[83]

As delineated below, *O'Bannon's* significance cannot be understated:

- The Ninth Circuit held that the compensation rules regulate commercial activity and fixed an aspect of the "price" that recruits pay to attend college.[84] Like *Law*, discussed *infra*, the *O'Bannon* district and appellate courts recognized that restraints on inputs are subject to antitrust purview.[85]
- The Ninth Circuit accepted the NCAA's argument that certain of its amateurism rules are necessary to preserve the line of demarcation between college and professional sports and thereby preserve college sports as a distinctive product.[86]
- Both the district and appellate courts, however, rejected the NCAA's argument that its amateurism rules are presumed valid as a matter of law. The Ninth Circuit held that whether NCAA amateurism rule will survive antitrust review "must be proved, not presumed."[87]
- Both courts accepted the NCAA's argument that its compensation rules served two procompetitive purposes: "integrating academics with athletics" and "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism."[88] According to the Ninth Circuit:

> [The] district court found, and the record supports that there is a concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers. We therefore conclude that the NCAA's compensation rules serve the two procompetitive purposes identified by the district court. . . .[89]

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83. *Id.* at 1079 (emphasis in original).

84. *Id.* at 1073.

85. *Id.* at 1053, 1063–64.

86. *Id.* at 1076.

87. *Id*. at 1064.

88. *Id.* at 1073.

89. *Id*. at 1073.

- The Ninth Circuit rejected, however, the NCAA's procompetitive justifications that its compensation rules promote competitive balance and that they increase output in the college education market.[90]

In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation[91]

In this case, the district court judge who adjudicated *O'Bannon*, Judge Wilken, held that student athlete eligibility rules that limit: "(1) the grant-in-aid at not less than the cost of attendance; (2) compensation and benefits unrelated to education paid on top of a grant-in-aid; (3) compensation and benefits related to education provided on top of a grant-in-aid[,]"[92] "constitute horizontal price-fixing agreements enacted and enforced with monopsony power."[93]

The court concluded:

> While Defendants have shown that limiting student-athlete compensation has some effect in preserving consumer demand for Division I basketball and FBS football as compared with no limit, Plaintiffs have shown that not all of the challenged rules are necessary to achieve this effect and that a less restrictive alternative set of rules would be virtually as effective as the set of challenged rules, without requiring significant costs to implement. The less restrictive alternative would remove limitations on most education-related benefits provided on top of a grant-in-aid, while allowing the NCAA to limit cash or cash-equivalent awards or incentives for academic achievement or graduation to the same extent it limits athletics awards. Limits on compensation and benefits not related to education and a limit on the grant-in-aid at not less than the cost of attendance would remain.[94]

In short, the court enjoined the NCAA from prohibiting universities from providing tangible items related to the pursuit of academic studies (e.g., computers and musical instruments and study abroad expenses).[95] It permitted

90. *Id.* at 1072. ("We therefore accept the district court's factual findings that the compensation rules do not promote competitive [balance and] that they do not increase output in the college education market . . .").

91. 375 F. Supp.3d 1058 (N.D. Cal. 2019).

92. *Id.* at 1101.

93. *Id.* at 1109.

94. *Id.*

95. *Id.*

the NCAA "to limit academic and graduation awards and incentives . . . provided in cash or a cash-equivalent to a level that the record shows is not demand-reducing or inconsistent with NCAA amateurism . . . ."[96] Both sides have appealed.

Ultimately, the significance of this case is:

- The NCAA obtained a partial victory in that plaintiffs were denied what they most desired—invalidation of all NCAA limits on compensation for student-athlete services. As a result of the ruling, colleges and universities are constrained from unfettered competition for the services of student-athletes.
- It was a partial victory for student-athletes in that the court expanded the scope of permissible educational benefits and removed any cap on the educational benefits that colleges and universities can provide to student-athletes.[97] Thus, such benefits provides another means by which institutions can compete for the services of student-athletes.

Alston v. NCAA[98]

On December 6, 2017, Judge Wilken approved a $208.7 million settlement the NCAA agreed to pay as damages[99] relating to the lawsuit filed by student-athletes who alleged that the cap limiting scholarships at less than the true cost of attendance violated federal antitrust laws.[100] Recently, more than 43,000 Division I men's and women's basketball players and Football Bowl Subdivision football players who played during from March 2010 through the 2016–17 seasons, began receiving their payments averaging approximately $3,800.[101] The complete breakdown is as follows:

- "More than 8,100 checks are for amounts between $5,000 and $10,000.
- Nearly 1,300 are for amounts between $10,000 and $20,000.

96. *Id*. at 1106.

97. *Id.* at 1110.

98. Complaint, Alston v. Nat'l Collegiate Athletic Ass'n, 2014 WL 843274 (N.D. Cal.) (No. 3:14CV01011).

99. Andy Berg, *NCAA Begins Paying Out $208M in Settlement Money*, ATHLETIC BUSINESS (October 2019), https://www.athleticbusiness.com/civil-actions/ncaa-finally-begins-paying-out-208m-in-settlement-money.html?eid=306479770&bid=2535782.

100. Complaint ¶ 110, *Alston*, 2014 WL 843274 (No. 3:14CV01011).

101. Berg, *supra* note 99.

- There are [fourteen] for $20,000 or more, including one for a little more than $36,000."[102]

2. State Legislation

California SB 206—The Fair Pay to Play Act[103]

On September 30, 2019, California governor, Gavin Newsom, signed SB 206 known as the Fair Pay for Play Act ("the Act").[104] Effective January 1, 2023, the legislation will permit student-athletes attending four-year colleges to obtain compensation, from third parties, for the use of athletes' names, images, and likenesses.[105] The Act achieves this by prohibiting colleges and universities from enforcing any rule promulgated by an athletic conference or athletic association (*e.g.*, the NCAA) that prohibits student-athletes from receiving third-party compensation for their NIL.[106] The Act specifically prohibits athletic conferences or athletic associations from prohibiting student-athletes from participating in intercollegiate athletics because the athlete received compensation from the use of her/his NIL.[107] The Act permits student-athletes to be represented by professionals (e.g., agents and attorneys) duly licensed in California for purposes of assisting athletes in seeking compensation from third parties for their use of athletes' NILs.[108]

The Act specifically prohibits colleges from compensating their student-athletes for the use of athletes' NILs.[109] It also prohibits a student-athlete from entering into contract related to her/his NIL if such contract would conflict with a "provision of the athlete's team contract."[110]

The pertinent parts of the legislation provide as follows:

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102. *Id.*

103. CAL. EDUC CODE § 67456 (West 2019).

104. Allen Kim, *California Gov. Gavin Newsom Passed SB 206 that Allows College Athletes to Get Paid*, CNN.COM (Sept. 30, 2019, 4:01 PM), https://www.cnn.com/2019/09/30/sport/california-sb-206-ncaa-trnd/index.html.

105. CAL. EDUC CODE § 67456 (West 2019).

106. *Id.* § 67456(a)(2).

107. *Id.*

108. *Id.* § 67456(c).

109. *Id.* § 67456(b).

110. *Id.* § 67456(e)(1).

Senate Bill No. 206

CHAPTER 383

An act to add Section 67456 to, and to add and repeal Section 67457 of, the Education Code, relating to collegiate athletics.

BILL TEXT

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SEC. 2.

Section 67456 is added to the Education Code, to read:

67456.

(a) (1) A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness. Earning compensation from the use of a student's name, image, or likeness shall not affect the student's scholarship eligibility.

(2) An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness.

(3) An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a postsecondary educational institution from participating in intercollegiate athletics as a result of the compensation of a student athlete for the use of the student's name, image, or likeness.

(b) A postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics shall not provide a prospective student athlete with compensation in relation to the athlete's name, image, or likeness.

(c) (1) A postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics shall not prevent a California student participating in intercollegiate athletics from obtaining professional representation in relation to contracts or legal matters, including, but not limited to, representation provided by athlete agents or legal representation provided by attorneys.

(2) Professional representation obtained by student athletes shall be from persons licensed by the state. Professional representation provided by athlete agents shall be by persons licensed pursuant to Chapter 2.5 (commencing with Section 18895) of Division 8 of the Business and Professions Code. Legal representation of student athletes shall be by attorneys licensed pursuant to Article 1 (commencing with Section 6000) of Chapter 4 of Division 3 of the Business and Professions Code.

(3) Athlete agents representing student athletes shall comply with the federal Sports Agent Responsibility and Trust Act, established in Chapter 104 (commencing with Section 7801) of Title 15 of the United States Code, in their relationships with student athletes.

(d) A scholarship from the postsecondary educational institution in which a student is enrolled that provides the student with the cost of attendance at that institution is not compensation for purposes of this section, and a scholarship shall not be revoked as a result of earning compensation or obtaining legal representation pursuant to this section.

(e) (1) A student athlete shall not enter into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete's team contract.

(e)(2) A student athlete who enters into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness shall disclose the contract to an official of the institution, to be designated by the institution.

(e)(3) An institution asserting a conflict described in paragraph (1) shall disclose to the athlete or the athlete's legal

> representation the relevant contractual provisions that are in conflict.
>
> (f) A team contract of a postsecondary educational institution's athletic program shall not prevent a student athlete from using the athlete's name, image, or likeness for a commercial purpose when the athlete is not engaged in official team activities. It is the intent of the Legislature that this prohibition shall apply only to contracts entered into, modified, or renewed on or after the enactment of this section.
>
> (g) For purposes of this section, "postsecondary educational institution" means any campus of the University of California or the California State University, an independent institution of higher education, as defined in Section 66010, or a private postsecondary educational institution, as defined in Section 94858.
>
> (h) This section shall become operative on January 1, 2023.[111]

Following the National Sports Law Institute's 30th anniversary conference, the NCAA took an important step. In October 2019, the NCAA Board of Governors voted to adopt a report of its NCAA Federal and State Legislation Working Group that the NCAA's three divisions immediately begin considering modifications of their bylaws to permit student-athletes to profit from their NILs.[112]

> It is the policy of the Association that NCAA member schools may permit students participating in athletics the opportunity to benefit from the use of their name, image and/or likeness in a manner consistent with the values and beliefs of intercollegiate athletics. To effectuate this change, the Board of Governors directs each of the three divisions to immediately begin considering modification and modernization of relevant NCAA bylaws and rules in harmony with the following principles and guidelines:
>
> • Assure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate.

111. *Id.* at § 67456.

112. NCAA, REPORT OF THE NCAA BOARD OF GOVERNORS OCTOBER 9, 2019, MEETING 1, (Oct. 29, 2019), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf.

> • Maintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success.
> • Ensure rules are transparent, focused and enforceable and facilitate fair and balanced competition.
> • Make clear the distinction between collegiate and professional opportunities.
> • Make clear that compensation for athletics performance or participation is impermissible.
> • Reaffirm that student-athletes are students first and not employees of the university.
> • Enhance principles of diversity, inclusion and gender equity.
> • Protect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution.[113]

- SB 206 enactment fostered similar legislation. Other states in which similar measures are in various stages of the legislative process include Colorado, Florida, Illinois, Kentucky, Minnesota, Mississippi, Nevada, New York, Oklahoma, Pennsylvania, and South Carolina.[114]
- Federal legislation has been proposed or is being proposed on the national level.[115] In December 2019, NCAA president Mark Emmert opined that federal legislation addressing student-athlete NIL compensation is likely to be promulgated.[116]
- The Act defies the longstanding NCAA rule prohibiting student-athletes from individually profiting from their NILs. It has the potential to significantly erode the NCAA's amateurism model.
- The Act also stimulated important discussions regarding the NCAA's conceptualization of amateurism and whether refusing to permit student-athletes to be compensated for their NILs is inequitable.[117]

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113. *Id.* at 3–4.

114. Brock Fritz, *Oklahoma, Mississippi Mull Pay-to-Play Legislation*, ATHLETIC BUS. (Jan. 2020) https://www.athleticbusiness.com/governing-bodies/oklahoma-mississippi-considering-pay-to-pay-legislation.html; Jason Scott, *California Law Prompts States to Consider Copycats*, ATHLETIC BUS. (Oct. 2019), https://www.athleticbusiness.com/civil-actions/california-law-prompts-states-to-consider-copycats.html.

115. Jason Scott, *Emmert: Congress Likely to Pass Compensation Law*, ATHLETIC BUS. (Dec. 2019), https://www.athleticbusiness.com/college/emmert-congress-likely-to-pass-compensation-law.html.

116. *Id.*

117. *Id.*

II. NCAA GOVERNANCE RESTRUCTURE & STUDENT-ATHLETE WELLNESS

A. Autonomy Legislation

In 2015, the NCAA changed its Division I governance structure to afford autonomous decision-making powers to the Power Five Conferences—the Atlantic Coast Conference ("ACC"), the Big Ten Conference, the Big 12 Conference, the Pac-12 Conference, and the Southeastern Conference ("SEC").[118] The Board delegated new authority to the Power Five Conferences to control policy development with respect to matters, including student-athlete health and wellness, meals and nutrition, certain aspects of financial aid, expenses and benefits pertaining to enrollment, insurance, and career pursuits[119]. In passing the autonomy legislation, the NCAA created an independent legislative authority.[120]

With their newfound legislative authority, the autonomy conferences have passed legislation that have had a profound impact on student-athlete wellness. Some of the more important of these legislative actions, as well as actions before the NCAA modified its governance structure, are discussed below.

B. Student-Athlete Wellness

1. Multi-Year Scholarships.

Pursuant to legislation the NCAA adopted in 1973, its rules restricted institutions to awarding to student-athletes one-year renewable athletic scholarships.[121] Effective August 2012, however, NCAA-amended legislation permits colleges and universities to award multi-year scholarships for up to five years.[122] After the passage of the autonomy legislation, three of the five autonomy conferences, the Big-Ten, the Pac-12 and the Big-12, adopted policies offering multi-year scholarships in all sports. [123]

Consistent with its multi-year scholarship legislation, in 2015 the NCAA adopted legislation seeking to protect the integrity of multi-year scholarships. 2015 NCAA legislation prevents colleges and universities from reducing a

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118. Brian D. Shannon, *The Revised NCAA Division I Governance Structure After Three Years: A Scorecard*, 5 TEX. A&M L. REV. 65, 67 (2017).

119. *Id.* at 79–80.

120. *Id.* at 73.

121. *See generally*, NCAA DIVISION I MANUAL, *supra* note 22.

122. *Id.* art. 15.02.8.

123. Timothy Davis, *Expanding Student-Athlete Benefits: Are There Costs?*, 5 MISS. SPORTS L. REV. 43, 45 (2016).

student-athlete's multi-year scholarship for athletic reasons, injury, or illness.[124]

i. True Cost of Attendance

The centerpiece of NCAA legislation passed by autonomy schools in January 2015 with an effective date of August 1, 2015, was a redefinition of permissible financial aid.[125] Prior to this legislation, "a student-athlete could receive athletically related financial aid limited to tuition and fees, room and board, and required course-related books."[126] Under the true cost of attendance legislation, an athletic scholarship was "redefined to encompass not only tuition, room, board, books, and fees, but also the incidental costs of attending college, such as transportation and miscellaneous personal expenses."[127] This legislation provides in part: "A student-athlete may receive institutional financial aid based on athletics ability . . . [and] up to the value of a full grant-in plus any other financial aid up to the cost of attendance."[128] "The cost of attendance legislation is mandatory for autonomy schools but permissive for non-autonomy schools. Due to competitive pressures, certain non-autonomy schools offer full-cost financial aid."[129]

ii. Easing of Transfer Restrictions

Before October of 2018, student-athletes seeking to transfer to another school, had to first obtain the permission of their coaches before contacting other schools to discuss the possibility of transferring.[130] Institutions wishing to recruit student-athletes interested in transferring were required to obtain the permission of the athletes' schools.[131] Under the new rule, student-athletes are afforded greater control of the transfer process. An athlete can begin the transfer process and seek a scholarship at a different school by notifying their coaches of her/his desire to transfer.[132] Within two business days of such notification, the coach must enter the athletes' name in an NCAA-managed database that identifies athletes who may be recruited by another college or university. Thereafter, other schools may recruit the athletes identified in the database.[133]

124. NCAA DIVISION I MANUAL, *supra* note 22, art. 15.3.4.3.

125. Davis, *supra* note 123, at 43..

126. *Id.* at 44.

127. *Id.*

128. NCAA DIVISION I MANUAL, *supra* note 22, art. 15.1.

129. Davis, *supra* note 123, at 45.

130. MITTEN ET AL., *supra* note 24, at 119.

131. *Id.*

132. NCAA DIVISION I MANUAL, *supra* note 22, art. 13.1.1.3.1.

133. *Id.*

iii. Other Legislation

Other changes geared toward student-athletes, include:

> permit[ting] student-athletes to borrow against their future professional earnings to purchase loss-in-value insurance (Division I Bylaw 12.1.2.4.4); expanded reimbursement or payment of travel expenses for certain family members to attend certain events (Division I bylaw 16.1.1); provided unlimited food (Division I Bylaw 16.5.2.5); and require[ing] schools to pay for medical care for athletics-related injuries for at least two years after graduation (Division I Bylaw 16.4.1).[134]

III. TITLE IX

A. Participation Opportunities

Cohen v. Brown University[135]

In 1991, Brown University demoted its women's gymnastics and volleyball teams from university-funded varsity status to donor-funded varsity status.[136] Brown similarly demoted its men's water polo and golf teams.[137] In 1993-94, men comprised 61.87 percent and women 38.13 percent, respectively, of the 897 students who participated on Brown's intercollegiate varsity athletics teams.[138] Women, however, comprised 51.14 percent of the undergraduate enrollment.[139] Focusing on the resulting 13.01 percent disparity between the percentage of female student-athletes on Brown's varsity athletic teams and the female undergraduate student enrollment, members of the demoted women's teams sued Brown alleging a violation of Title IX.[140]

The court adopted and applied the Department of Education, Office of Civil Rights' ("OCR") 1979 three-part test to determine compliance with Title IX in regards to participation opportunities:

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134. *In re* Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1069 (N.D. Cal. 2019).

135. 101 F.3d 155 (1st. Cir. 1996)

136. *Id.* at 163.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 163–64.

> 1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> 2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
>
> 3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[141]

According to the court, an institution complies with Title IX if any prong of the three-prong test is established.[142] Finding that Brown did not fall within any prong, the court ruled that the university's demotion of the women's teams violated Title IX.[143]

Cohen's significance resides in the following:

- In *Cohen*, the court adopted, interpreted, and applied the 1978 OCR three-part test for determining whether participation opportunity had been denied.[144]
- The court's focus on the first prong, substantial proportionality, has become the most significant of the three standards for assessing compliance with Title IX.[145]
- Only minor deviations in the proportion of female student-athletes and female undergraduate enrolled students will be permitted.[146]
- Title IX permits an institution to take affirmative measures to increase gender equity and to use statistical evidence of disparity to prove

141. *Id.* at 166.

142. *See id.*

143. *Id.* at 166, 169–70. ("[T]he primary arguments [regarding the application of the three-prong test to this case] have already been litigated and decided adversely to Brown in the prior appeal.").

144. *See id.* at 166.

145. *See. generally id.* at 171.

146. *Id.* at 176.

discrimination. Therefore, gender conscious remedies are appropriate and constitutionally permissible under a federal anti-discrimination statute.[147]

- In assessing participation opportunities, it's impermissible to include the number of female junior varsity athletes in determining substantial proportionality.[148]
- 4 case set the stage for the increase in female varsity athletic participation opportunities over the past thirty years.

B. Title IX and Sexual Harassment: Coaches and Athletes

Jennings v. University of North Carolina at Chapel Hill[149]

A female student-athlete alleged that remarks made by her male coach created a sexually hostile educational environment in violation of Title IX.[150] The court stated that to establish a cognizable Title IX hostile environment claim, a plaintiff must establish:

> (1) that she belongs to a protected group (e.g., a student at an institution covered by Title IX); (2) that she was subjected to harassment based on her sex; (3) that the harassment was sufficiently severe or pervasive to create an abusive educational environment; and (4) a cognizable basis for imputing institutional liability under Title IX.[151]

A three-judge panel found that no reasonable jury could find that the coach's "remarks during [plaintiff's] two-year tenure on the team were sufficiently severe or pervasive to create a sexually hostile educational environment."[152] On reconsideration *en banc*, the Fourth Circuit ruled that the plaintiff alleged sufficient facts for a jury to reasonably find that the coach's persistent harassment was sufficiently degrading to young women to create a hostile or abusive environment.[153]

147. *Id.* at 185.

148. *See id.* at 186–87.

149. 444 F.3d 255 (4th Cir. 2006).

150. *See id.* at 260–65.

151. *Id*. at 267–68.

152. *Id*. at 275.

153. Jennings v. Univ. of N.C., 482 F.3d 686, 701 (4th Cir. 2007).

Simpson v. University of Colorado Boulder[154]

Two female students alleged they were sexually assaulted by football players and recruits at a party.[155] They asserted that the likelihood that sexual assaults would occur was heightened by the university's adoption of an official policy that paired recruits with "female ambassadors" to ensure that the recruits would be shown a good time.[156]

The court framed the critical issue as whether a risk existed that a sexual assault might occur during a recruiting visit.[157] The court found evidence sufficient to establish such a risk, including: the head football coach's general knowledge of the serious risk of sexual assault during recruiting visits; the coach's specific knowledge that assaults had previously occurred during recruiting visits at CU; the coach's maintenance of an unsupervised player-host program notwithstanding this knowledge; the inadequacy of steps taken by CU to reduce the risk of sexual assaults during recruiting visits; and the head coach's resistance to recruiting reform efforts.[158]

Baylor University Sexual Harassment Scandal

In 2016, several female students at Baylor University asserted Title IX violations based, in part, on the alleged failure of athletic administrators to appropriately address male student-athletes' sexual assault of female students.[159] A law firm retained by Baylor to investigate the allegations issued a report in which it found widespread shortcomings by the university.[160] The resulting scandal had several consequences including the NCAA sending a notice of allegations to Baylor, termination of the head football coach, disciplining of the athletic director and his resignation, and the demotion and eventual resignation of the university's president.[161]

154. 500 F.3d 1170 (10th Cir. 2007).

155. *Id.* at 1173.

156. *Id.*

157. *Id.* at 1180–81.

158. *Id.* at 1184–85

159. *See* Rachel Axon, *Title IX Lawsuits Key to Revealing Real Picture at Baylor*, USA TODAY (Oct. 31, 2016, 8:50 PM), https://www.usatoday.com/story/sports/ncaaf/big12/2016/10/31/baylor-football-sexual-assault-lawsuits-title-ix/93085720/.

160. *Id.*

161. Adam Grosbard, *Baylor Sexual Assault Scandal Timeline: From Football Convictions to Title IX Investigation*, DALLAS MORNING NEWS, Oct. 28, 2016, https://www.dallasnews.com/sports/baylor-bears/2016/10/28/baylor-sexual-assault-scandal-timeline-from-football-convictions-to-title-ix-investigation/.

- The forgoing matters shine the spotlight on the responsibilities of athletic administrators, including head coaches and athletic directors at the college level, to protect female students from sexual assault and harassment that creates a hostile educational environment.
- These matters also affirm the use of Title IX as a vehicle for recovery based on sexual harassment engaged in by coaches or student-athletes, as well as coaching conduct that exposes women to a heightened risk of sexual harassment by male athletes.

IV. STUDENT-ATHLETE HEALTH & SAFETY AND TORT LIABILITY

A. Safety Measures

Kleinknecht v. Gettysburg College[162]

Drew Kleinknecht, a 20-year-old sophomore lacrosse player at Gettysburg College, suffered cardiac arrest during a lacrosse practice.[163] No athletic trainer was present at the practice.[164] The Third Circuit held that the college "had a duty [of care] to provide prompt and adequate emergency medical services to [Kleinknecht], one of its intercollegiate athletes, while he was engaged in a school-sponsored athletic activity for which he had been recruited."[165] The court stopped short of finding the existence of an all-encompassing special relationship between student-athletes and their colleges and universities.[166] Nevertheless, the court's holding is partially premised on Kleinknecht's status as a student-athlete, which gave rise to the college's duty of care to its athletes to have appropriate medical measures in place given that it is foreseeable that an athlete could experience a life threatening medical event during participation in intercollegiate athletics.[167]

- The *Kleinknecht* case was instrumental in colleges and universities implementing safety measures (*e.g.*, having trainers and defibrillators present during practices and games) that allow them to promptly respond to medical emergencies occurring during practice or games.

162. 989 F.2d 1360 (3d Cir. 1993).
163. *Id.* at 1362–63.
164. *Id.*
165. *Id.* at 1371.
166. *See id.* at 1367–69.
167. *Id.*

B. Co-Participant Tort Liability

Avila v. Citrus Community College District[168]

Courts have held that a co-participant's duty to another participant is not to increase the inherent risks associated with playing a game.[169] This rule was extended to shield a college from liability to a player on an opposing team.[170] In *Avila*, the court held that although a university has legal duty not to increase the risk inherent in an intercollegiate sports, it has no duty to prevent one of its pitchers from intentionally throwing at an opposing team's batter because "being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball."[171]

C. Physical Impairment

Knapp v. Northwestern University[172]

Northwestern University awarded a basketball scholarship to a student-athlete who had an internal defibrillator implanted after he experienced sudden cardiac arrest during a high school recreational basketball game.[173] The athlete desired to play basketball, and three cardiologists cleared him to play.[174] On the advice of its team physician, Northwestern deemed Knapp ineligible to play basketball due to the potential risk associated with his heart condition.[175] The university agreed to honor its scholarship commitment to Knapp, who sued alleging the university's refusal to permit him to play violated the Rehabilitation Act.[176]

The Seventh Circuit reversed the district court's injunction issued on behalf of Knapp.[177] It applied the following standard for determining if a policy or conduct violates the Rehabilitation Act: (1) "[the claimant] is disabled as

168. 131 P.3d 383 (Cal. 2006).

169. *E.g.*, Lowe v. Cal. League of Prof'l Baseball, 65 Cal. Rptr.2d 105, 109 (Cal App. 1997); Knight v. Jewett, 834 P.2d 696, 708 (Cal. 1992).

170. 131 P.3d at 394.

171. *Id.*

172. 101 F.3d 473 (7th Cir. 1996).

173. *Id.* at 476.

174. *See id.* at 477–78.

175. *Id.* at 476–77.

176. *Id.* at 477.

177. *Id.* at 485.

defined by the Act; (2) he is otherwise qualified for the position sought; (3) he has been excluded from the position sought solely because of his disability; and (4) the position exists as part of a program or activity receiving federal financial assistance."[178] Focusing on whether Knapp established the first prong, the claimant is disabled, the court held that a claimant must prove that he/she: "(i) has a physical impairment . . . which substantially limits one or more of [the claimant's] major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[179]

The court held that playing intercollegiate basketball was not a "major life activity" but instead only part of the major life activity of learning at a college or university.[180] As stated by the court, "Playing or enjoying intercollegiate sports therefore cannot be held out as a *necessary* part of learning for *all* students."[181]

- While recognizing that a college or university is subject to the Rehabilitation Act, *Knapp* illustrates the deference that courts afford college and universities.
- *Knapp* also is consistent with other decisions finding that participation in intercollegiate or interscholastic athletics does not give rise to a property interest because it is only one component of the educational process.[182]

D. Concussion Litigation

Arrington v. NCAA was the first class action concussion suit filed against the NCAA.[183] Similar lawsuits were consolidated into *In re Nat'l Collegiate Athletic Ass'n. Student-Athlete Concussion Injury Litigation.*[184] On September 27, 2018, the presiding judge preliminarily approved a settlement agreement requiring the NCAA to pay $70 million to set up a 50-year medical monitoring program for college athletes and another $5 million to start a program to research the prevention and treatment of concussions.[185] The settlement's medical monitoring program will allow for medical screenings and evaluations

178. *Id.* at 478.

179. *Id.*

180. *Id*. at 480.

181. *Id*.

182. *See, e.g.*, Richards v. Perkins, 373 F.Supp. 2d 1211 (D. Kan. 2005); Hysaw v. Washburn Univ. of Topeka, 690 F.Supp. 940 (D. Kan. 1987); Brands v. Sheldon Community Sch., 671 F.Supp. 627 (N.D. Iowa 1987); Mayo v. W. Va. Secondary Sch. Activities Comm'n, 672 S.E.2d 224 (W. Va. 2008).

183. *See* In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litigation, 2014 WL 7237208, at *1 (N.D. Ill. Dec. 17, 2014).

184. *Id.*

185. *Id*. at *3.

for all current and former NCAA student-athletes regardless of the sport or how long the athletes played. The settlement imposes requirements on colleges and universities such as requiring that medical personnel trained to diagnose and treat concussions be present at games involving contact sports. The settlement does not prohibit individual plaintiffs from bringing concussion-related suits against the NCAA.[186] Consequently, numerous concussion lawsuits have been filed against the NCAA and/or its member institutions.[187] For example, Les Williams, who played defensive end at the University of Alabama, is one of more than 100 individuals seeking recovery based on allegations that the NCAA and athletic conferences failed to warn players of the risk associated with concussions.[188]

Other notable concussion lawsuits against the NCAA and/or colleges include *Greiber v. NCAA*,[189] which involves a female lacrosse player's suit against the NCAA and Hofstra University for concussion-related injuries she allegedly sustained while playing lacrosse. The plaintiff alleged the NCAA acted negligently in failing to "implement adequate regulations in order to address the detection, treatment, and prevention of head injuries."[190] The court found that the plaintiff alleged sufficient facts to overcome the NCAA's motion to dismiss because the NCAA owed a duty of reasonable care to the plaintiff. As to the source of the duty, the court concluded that the NCAA exercised control over "rules of play and equipment, and imposed conditions of membership on its member institutions, which included requirements regarding head-injury protocols."[191]

An 2018 ruling by the Ohio Supreme Court could have potentially far-reaching effects for similarly-injured plaintiffs in the future.[192] In a lawsuit filed by the estate of a deceased football player who had CTE, the court became the first appeals court to consider whether CTE is a latent disease. Although the court did not expressly conclude that CTE qualifies as a latent disease, it did not

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186. *Id.* at *4.

187. *Wave of Concussion Lawsuits to Test NCAA's Liability*, USA TODAY, Feb. 7, 2019, https://www.usatoday.com/story/sports/ncaaf/2019/02/07/wave-of-concussion-lawsuits-to-test-ncaas-liability/39022587/.

188. Jesse Dougherty, *Former Alabama Player Les Williams is One of More Than 100 Suing NCAA Over Brain Injury*, WASHINGTON POST, July 23, 2018, https://www.washingtonpost.com/news/sports/wp/2018/07/02/feature/former-alabama-player-les-williams-is-one-of-more-than-100-suing-ncaa-over-brain-injuries/; *See also* Andy Berg, *Former Lineman Sues NCAA Over Parkinson's,* ATHLETIC BUS. (Oct. 2018), https://www.athleticbusiness.com/safety-security/former-lineman-files-sues-ncaa-over-parkinson-s.html (describing former collegiate lineman Joel Jarosz' claim against the NCAA).

189. 2017 WL 6940498 (N.Y. Sup. Ct., Sept. 8, 2017).

190. *Id*. at *4.

191. *Id*. at *5.

192. Schmitz v. NCAA, 122 N.E.3d 80 (Ohio 2018).

rule that the disease does not qualify.[193] Thus, the ruling could help athletes in the future who suffer from CTE and do not realize that they feel the disease's impact from their previous participation in sports and thereby extend the time within which athletes can assert claims.

V. COACHES

A. Liquidated Damages Provisions

Vanderbilt Univ. v. Dinardo[194]

The employment contract between a head football coach, DiNardo, and Vanderbilt contained reciprocal liquidated damages provisions requiring Vanderbilt to pay DiNardo his remaining salary if he was removed as head coach during his five-year contract.[195] The contract also required DiNardo to pay Vanderbilt "an amount equal to his Base Salary, less amounts that would otherwise be deducted or withheld from his Base Salary for income and social security tax purposes, multiplied by the number of years (or portion(s) thereof) remaining on the Contract" if he resigned or otherwise terminated his employment as the university's head football coach.[196] After DiNardo resigned from his position with Vanderbilt to become LSU's head football coach, Vanderbilt sought to enforce the liquidated damages provision of their contract.[197]

In rejecting DiNardo's argument that the provision constituted an unenforceable penalty, the court focused on the difficulty of assessing monetary damages extending beyond the cost of hiring a new coach. The court observed that such difficulty arises from the uniqueness of the head coach position and the impact of a coaching change on alumni relations, public support, student-athlete recruitment, ticket sales, financial contributions to the athletics program, the retention of assistant coaches, and the overall stability of the football program.[198] The court also stated that Vanderbilt did not waive the liquidated damages provision by granting DiNardo permission to talk with LSU about its coaching position.[199]

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193. *See id.* at 89 (while not stating that CTE qualifies as a latent disease, the court stated that further factual determinations were necessary for determining whether the claim is time barred).

194. 174 F.3d 751 (6th Cir. 1999).

195. *Id.* at 753.

196. *Id.* at 754.

197. *Id.* at 755.

198. *Id.* at 756.

199. *Id.* at 757.

- The case validates liquidated damages which now are common provisions included in coaching contracts.

B. Antitrust

Law v. NCAA[200]

As a part of its efforts to control the increasing costs of athletics program and concomitant deficits experienced by most Division I athletics programs, the NCAA adopted a bylaw that capped the salaries of a class of assistant basketball coaches who became known as Restricted Earnings Coaches ("REC").[201] Under the legislation, RECs' compensation was limited to $16,000 per year.[202] RECs challenged the NCAA bylaw as an unreasonable restraint of trade in violation of the Sherman Act.[203]

The court found that the Sherman Act not only applies to output restraints that clearly harm consumer welfare, but also to input market restraints (*i.e.*, restraints that harm those who—like coaches—contribute to the production of the relevant product).[204] Applying the Rule of Reason analysis adopted by the Supreme Court in *NCAA v. Board of Regents*,[205] the court held that the salary cap violated the Sherman Act as a matter of law because it totally eliminated price competition among NCAA member institutions for the services of a class of coaches.[206] Thus, the REC bylaw had an anticompetitive effect in that it artificially lowered the price of coaching services.[207]

The court rejected the NCAA's two procompetitive justifications, controlling costs as a means of maintaining competitive balance of teams and preserving entry level positions for younger less experienced coaches. On the competitive balance justification, the court ruled that the cap of REC's salaries would not achieve this objective because no limit was imposed on the amount of money schools could spend on their athletics programs.[208] The court also held that while preserving entry-level coaching positions for younger less

200. 134 F.3d 1010 (10th Cir. 1998).

201. *Id.* at 1014.

202. *Id.*

203. *Id.* at 1015.

204. *Id.* at 1018-19.

205. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 486 U.S. 85, 117-120 (1984).

206. 134 F.3d at 1019-20.

207. *Id.* at 1020.

208. *Id.* at 1024.

experienced coaches might be socially desirable, it was not a procompetitive economic justification under a Rule of Reason analysis.[209]

- *Law* recognizes that restraints on inputs necessary to produce intercollegiate athletic competition are subject to antitrust scrutiny under the Sherman Act.
- The case also maintains the distinction recognized in *Board of Regents* between NCAA bylaws that are of a commercial character and likely to violate the Sherman Act (e.g., TV contracts and coaches' salaries) and those that are noncommercial in character and are likely to be procompetitive (*e.g.*, NCAA recruiting rules and student-athlete eligibility rules).
- *Law* also removed a potential impediment to the tremendous rise in coaches' salaries that has occurred over the past 20 years.

VI. NCAA INFRACTIONS AND ENFORCEMENT

A. Penn State University

In a controversial 2012 case, which critics argued fell outside of the scope of the NCAA enforcement process, the NCAA and Penn State University entered into a consent decree related to matters arising out of the sexual abuse of young boys that occurred at the university's athletics facilities.[210] The terms of the consent decree included Penn State paying a $60 million fine, a four-year post-season ban for football, scholarship reductions spanning four years, probation, the vacation of wins of the Penn State football team for 1998-2011, and certain monitoring and reporting obligations.[211] In January 2015, the NCAA vacated all the forgoing and other sanctions except for the $60 million fine.[212] The reversal was a part of a settlement of a lawsuit filed by a Pennsylvania state senator who challenged the legality of the consent decree.[213]

B. University of North Carolina at Chapel Hill

In a highly anticipated case, the NCAA's Committee on Infractions issued

209. *Id.* at 1021-22.

210. Matthew J. Mitten, *The Penn State "Consent Decree": The NCAA's Coercive Means Don't Justify Its Laudable Ends, But is There a Legal Remedy?*, 41 PEPP. L. REV. 321, 322 (2014).

211. *Id.*

212. Jeré Longman & Marc Tracy, *The Rehabilitation of Joe Paterno, Back at No. 1*, NY TIMES, Jan. 16, 2015, https://www.nytimes.com/2015/01/17/sports/ncaafootball/joe-paterno-penn-state-ncaa-wins-restored.html.

213. *Id.*

a 2017 decision in which it largely exonerated UNC of violations related to academic irregularities in its Afro and African American Studies Department. The irregularities included independent study classes without supervision by the instructor of record, independent study grades given by persons other than the instructor of record, lecture classes not requiring class attendance, unauthorized grade changes, and independent study classes that were designated as lecture classes.[214]

The COI concluded that whether conduct constitutes academic fraud is a determination that is made at the institutional level. It concluded that because UNC did not consider the course irregularities as amounting to academic fraud or misconduct; it was outside of the purview of the NCAA to make that determination. The COI decision's significance resides in:

- The ruling limits the extent to which the NCAA can intervene and enforce sanctions against its member institutions for academic irregularities.
- In October 2019, the NCAA Board of Governors declined to consider proposed legislation that would have expanded the NCAA's authority to impose sanctions for egregious academic misconduct.[215]

C. Changes to the NCAA Enforcement Process

In 2012, the NCAA's Division I Board of Directors adopted major changes to its enforcement processes. One of the more significant changes was replacing the former two-tier structure of major and secondary violations with a four-tier structure for identifying rules violations and for imposing sanctions for violations.[216]

Level I (severe breach of conduct) consists of "violations that seriously undermine or threaten the integrity of the NCAA Collegiate Model, as set forth in the constitution and bylaws, including any violation that provides or is intended to provide a substantial or extensive recruiting, competitive or other advantage, or a substantial or extensive impermissible benefit."[217]

Level II (significant breach of conduct) consists of "violations that provide

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214. Jason Scott, *NCAA Nixed Academic Fraud Recommendations*, ATHLETIC BUS. (Oct. 2019), https://www.athleticbusiness.com/governing-bodies/documents-ncaa-rejects-academic-fraud-recommendations.html; *See also* Staff, *Timeline of the UNC Investigation*, NEWS OBSERVER (April 25, 2016), https://www.newsobserver.com/sports/college/acc/unc/article73760402.html.

215. Jeremy Bauer-Wolf, *NCAA Does Not Move Forward With New Academic Reform Rules*, Inside Higher Ed (Sept. 5, 2019), https://www.insidehighered.com/news/2019/09/05/ncaa-does-not-move-forward-new-academic-reform-rules.

216. Timothy Davis & Christopher T. Hairston, *Majoring in Infractions: The Evolution of the National College Athletic Association's Enforcement Structure,* 92 OR. L. REV.979, 1002 (2014).

217. NCAA DIVISION I MANUAL, *supra* note 22, art. 19.1.1

or are intended to provide more than a minimal but less than a substantial or extensive recruiting, competitive or other advantage . . . or . . . conduct that may compromise the integrity of the NCAA Collegiate Model as set forth in the constitution and bylaws."[218]

Level III (breach of conduct) consists of "violations that are isolated or limited in nature; provide no more than a minimal recruiting, competitive or other advantage; and provide no more than a minimal impermissible benefit."[219]

Multiple Level IV violations may collectively be considered a breach of conduct. Level IV (incidental issues) consists of minor infractions that are inadvertent and isolated, technical in nature and result in a negligible, if any, competitive advantage.[220] Note that in 2017, the NCAA eliminated the Level IV category of violations.[221]

In an effort to achieve greater consistency in meting out sanctions, the revised enforcement bylaws provide a structure that sets forth a range of potential sanctions for each level of violations based on their respective severity.[222] For example, core penalties for Level I and Level II violations include limits on postseason competition, financial penalties (including fines or reduction or elimination of revenue sharing in postseason competition), recruiting restrictions, scholarship reductions, show-cause orders related to disciplinary or corrective actions for individuals who violate NCAA rules, and sanctions on head coaches (including suspension).[223] Additional Level I and Level II penalties are enumerated in Bylaw 19.9.7. Penalties imposed for Level III violations range from deeming student-athletes ineligible, to suspension of athletic personnel, to scholarship reductions.[224]

In imposing penalties, the Committee of Infractions can take into account mitigating and aggravating circumstances, which may alter the standard penalties.[225] The penalty structure provides guidance on the penalties to impose if any such factors are present.

Effective August 1, 2019, NCAA enforcement includes a new independent infractions process, the Independent Accountability Resolution Process. The process has been described as follows:

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218. *Id.* at art. 19.1.2.

219. *Id.* at art. 19.1.3.

220. NCAA, 2015–16 NCAA DIVISION I MANUAL art. 19.1.4, at 314 (Aug. 1, 2015).

221 . For a discussion of the rationale for the modification, see *Division I Proposal- 2017-7*, NCAA LSDBI, https://web3.ncaa.org/lsdbi/search/proposalView?id=100647.

222. NCAA DIVISION I MANUAL, art. 19.1.

223. *Id* at art. 19.9.5.

224. *Id*. at art. 19.9.8.

225. *Id*. at art. 19.9.2.

> The change brings independent investigators, advocates and decision-makers to the infractions process to minimize perceived conflicts of interest and to add different perspectives to the review of infractions matters. Select complex cases will be eligible for the independent process. Examples of complex cases include alleged violations of core NCAA values, such as alleged failures to prioritize academics and the well-being of student-athletes; the possibility of major penalties; or conduct contrary to the cooperative principles of the existing infractions process.[226]

NCAA Bylaw 19.11 provides that an infractions matter may be referred to such a panel if doing so will best serve the interests of the organization.[227]

D. College Basketball Scandal

In September 2017, following a two-year FBI investigation of college basketball coaches, sports agents, and Adidas executives, federal prosecutors issued a criminal complaint against four assistant men's basketball coaches: Chuck Person (Auburn University), Tony Bland (University of Southern California), Emanuel "Book" Richardson (University of Arizona), and Lamont Evans (Oklahoma State University).[228] The defendants allegedly solicited bribes and wire services arising from coaches funneling money from Adidas executives to the families of high school basketball recruits as part of efforts to influence basketball recruits to attend and play basketball at universities affiliated with Adidas.[229] Each of the coaches pled guilty and received sentences ranging from community service and probation to time in jail.[230]

The scandal led to the termination of Rick Pitino as head coach of the Louisville's men's basketball team.[231] It will likely lead to the NCAA asserting

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226. *New Independent Infractions Process Launches*, NCAA (Aug. 1, 2019, 1:41 PM), http://www.ncaa.org/about/resources/media-center/news/new-independent-infractions-process-launches.

227. *Id.*

228. Mitch Sherman, *Everything You Need to Know About the College Basketball Scandal*, ESPN (Feb. 23, 2018), www.espn.com/mens-college-basketball/story/_/id/22555512/explaining-ncaa-college-basketball-scandal-players-coaches-agents.

229. *Id.*

230. *See* Andrew Denney, *Another Ex-NCAA Coach Gets Prison Time in Bribery Scandal*, NY POST, June 7, 2019 https://nypost.com/2019/06/07/another-ex-ncaa-coach-gets-prison-time-in-bribery-scandal/; *see also* Kyle Boone, *College Basketball Corruption Trial: Ex-Auburn Assistant Chuck Person Avoids Prison Time*, CBS SPORTS (July 17, 2019, 2:36 PM), https://www.cbssports.com/college-basketball/news/college-basketball-corruption-trial-ex-auburn-assistant-chuck-person-avoids-prison-time/.

231. Sherman, *supra* note 230.

charges against institutions as exemplified by the Notice of Allegations, alleging Level I violations were committed by University of Kansas's men's basketball team, its head coach Bill Self, and assistant coach Kurtis Townsend.[232] The Notice of Allegations asserts a lack of institutional control by Kansas.[233]

E. College Admission Scandal

In March 2019, federal prosecutors revealed an illicit college admission scheme tied, in part, to NCAA athletics. Rick Singer, the scheme's mastermind, "admitted to funneling portions of $25 million in bribes from rich parents to coaches, test-cheaters and others to get their children into some of the nation's top universities," including Georgetown, Yale, Stanford, University of Southern California, UCLA, and Wake Forest.[234] One aspect of the scheme, dubbed 'Varsity Blues,' allegedly involved coaches helping "undeserving students" gain admissions to elite universities by portraying the students as top athletes when they were not.[235] To date, Meredith, Center, Janke, and Khosroshahin have agreed to plead guilty, and Vandemoer has already pled guilty and been sentenced to one day in prison (already served), two years of supervised release, and a $10,000 fine.[236]

Among the coaches facing federal charges are: Jovan Vavic (USC Men's Water Polo Coach), Gordon Ernst (Georgetown Men's and Women's Tennis Coach), William Ferguson (Wake Forest Women's Volleyball Coach), Jorge Salcedo (UCLA Men's Soccer Coach), Ali Khrosroshahin (USC Women's Soccer Coach), Laura Janke (USC Assistant Women's Soccer Coach), Rudy Meredith (Yale Women's Soccer Coach), John Vandemoer (Stanford Sailing Coach), and Michael Center (Texas Men's Tennis Coach).[237]

- As a result of the scandal, colleges and universities are reviewing and changing their admissions policies and procedures for admitting student-athletes.

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232. Associated Press, *Kansas Receives Notice of Allegations From NCAA Alleging Big Violations by Basketball Team*, USA TODAY, Sept. 23, 2019, https://www.usatoday.com/story/sports/ncaab/2019/09/23/kansas-notice-allegations-ncaa-basketball-bill-self/2424843001/.

233. *Id*.

234. Joey Garrison, *College Admissions Scandal Tracker: Who's Pleaded Guilty, Who's Gone to Prison, and Who's Still Fighting,* USA TODAY, May 23, 2019, https://www.usatoday.com/story/news/nation/2019/05/23/lori-loughlin-felicity-huffman-college-admissions-scandal-rick-singer-guilty-not-guilty-list/3704724002/.

235. *College Admissions Scandal: Your Questions Answered*, NY TIMES, Mar. 14, 2019, https://www.nytimes.com/2019/03/14/us/college-admissions-scandal-questions.html.

236. Garrison, *supra* note 236.

237. *Id.*

- It is unclear if any NCAA rules violations will arise as a result of the conduct related to the scandal.

VII. SPORTS GAMBLING

Murphy v. NCAA[238]

In May 2018, the U.S. Supreme Court ruled that the Professional and Amateur Sports Protection Act violated the 10th Amendment of the U.S. Constitution.[239] As a result of the ruling, each state can determine whether to legalize sports gambling and establish rules to regulate gambling.[240]

In response to the decision, the NCAA Board of Governors created an ad hoc Committee on Sports Wagering to address how to best respond to the changing wagering landscape. In addition, the NCAA is working with an undisclosed entity to develop measures to "protect . . . the integrity of competition[s]."[241]

238. 138 S. Ct. 1461 (2018).

239. *Id.* at 1485.

240. *Id.* at 1484-85.

241. Stacey Osburn, *NCAA, Members Continue to Address Sports Wagering Concerns*, NCAA (Aug. 30, 2019, 12:17 PM), http://www.ncaa.org/about/resources/media-center/news/ncaa-members-continue-address-sports-wagering-concerns.